(2)

No. 03-911

Supreme Court, U.S.
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In The
Supreme Court of the United States

S.D. MYERS, INC.,

Petitioner,

v.

CITY AND COUNTY OF SAN FRANCISCO AND SAN FRANCISCO HUMAN RIGHTS COMMISSION,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether San Francisco's Equal Benefits Ordinance is valid under Due Process and the dormant Commerce Clause where the Ordinance applies only to businesses that enter into contracts with the City, and to employees working on those contracts, and the Ordinance serves the City's legitimate interest in dissociating itself from a form of discrimination that is offensive to the local community.

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INTRODUCTION

In *S.D. Myers, Inc. v. City and County of San Francisco*, 253 F.3d 461 (9th Cir. 2001), the Ninth Circuit applied well-settled law to the facts of the case to uphold San Francisco's Equal Benefits Ordinance ("the Ordinance") under the Due Process and Commerce Clauses. The Ninth Circuit's decision is consistent with decisions of this Court and other circuit courts. Petitioner S.D. Myers, Inc. ("Myers") presents no sound basis for granting *certiorari*.

For over 30 years, Respondent City and County of San Francisco ("the City") has refused, as a matter of public policy, to do business with contractors that discriminate on the basis of sexual orientation. In 1997, the City enacted the Ordinance to "fulfill in economic terms" this promise. Petitioner's Appendix ("App.") 25a. The Ordinance is a nondiscrimination-in-contracting measure that instructs the City's departments and contracting agents to include in City contracts a provision requiring that contractors provide the same benefits to married employees and employees with domestic partners.

Myers is an Ohio-based company that bid on but was not awarded a City contract because Myers refused to certify that it would comply with the Ordinance. Myers challenged the Ordinance under the Due Process and Commerce Clauses, among other grounds. Both the district court and Ninth Circuit rejected Myers' challenge.

In its *certiorari* petition, Myers (1) manufacturers conflicts that do not exist; (2) seeks to remedy a failure of proof by citing "subsequent developments" that either predate the decision below or make no difference to the result; and (3) remakes case-specific arguments already

lost. Not only is Myers' Petition without merit, it is untimely and the company lacks standing to assert its claims.

The Court should deny *certiorari*.

STATEMENT OF FACTS

Adopted in November 1996 and made operative on June 1, 1997, the Ordinance expresses the City's decision to do business only with companies that provide equal compensation for their married employees and their employees with domestic partners. *See* S.F. Admin. Code § 12B.1, *et seq.* (App. F). The Ordinance does not require City contractors to provide any particular benefits. It mandates only that if a contractor provides benefits to its married employees, the contractor must treat its employees with domestic partners on an equal basis. San Francisco Administrative Code section 12B.1(b) states:

> No contracting agency of the City . . . shall execute or amend any contract or property contract with any contractor that discriminates in the provision of . . . benefits between employees with domestic partners and employees with spouses, . . . where the domestic partner has been registered with a governmental entity. . . .

The Ordinance is not a police power measure of general application; rather it applies only to companies that contract with the City. Geographically, the Ordinance applies "to (i) any of a contractor's operations within San Francisco; (ii) a contractor's operations on real property outside of San Francisco owned by the City or that the City has a right to occupy if the contractor's presence at

that location is connected to a contract or property contract with the City; and (iii) [other locations] where the work is being performed by a contractor for the City within the United States." S.F. Admin. Code § 12B.1(d)(i), (ii) and (iii). While the application of the first two subsections is mandatory, the application of subsection d(iii) is discretionary, depending upon prescribed factors. S.F. Human Rights Comm. Rules of Procedure, Rule IV (B)(3) (http://www.sfgov.org/site/sfhumanrights).

In September 1997, Myers was the low bidder on a contract to maintain and service City-owned electrical generators on property that the City owned outside of its boundaries in northern California. When Myers refused to certify that it would comply with the nondiscrimination provisions of the Ordinance, the City rejected its bid and entered into negotiations with the next highest bidder. Because Myers would not comply with any provision in the Ordinance, the City never had occasion to determine whether San Francisco Administrative Code section 12B.1(d)(iii) would apply the Ordinance to any of Myers' operations outside the state of California.

Myers sued the City and its Human Rights Commission. Among other things, the company alleged that the Ordinance's potential extraterritorial application violated (1) the dormant Commerce Clause, (2) the Due Process Clause, and (3) the California Constitution.

On May 27, 1999, the district court granted the City's motion for summary judgment. App. B.

On June 14, 2001, the Ninth Circuit affirmed. App. A. The court rejected Myers' claim that the Ordinance directly regulated interstate commerce in violation of the Commerce Clause because (1) the Ordinance applies only

to those companies who contract with the City, regardless of whether the companies are engaged in interstate commerce (*id.* at 7a-9a); and (2) Myers produced no evidence that the Ordinance conflicted with actual or imminent legislation in other states (*id.* at 12a). The court rejected Myers' claim that the Ordinance indirectly regulated interstate commerce in violation of the Commerce Clause because the City's legitimate interests in applying the Ordinance outweighed the limited burden on interstate commerce. *Id.* at 14a. The court rejected Myers' Due Process claim because the Ordinance's provisions did not constitute economic penalties under *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996), and even if they had, the Ordinance is supported by legitimate City interests. *Id.* at 15a. The court also remanded Myers' claim under the California Constitution for the district court to decide in the first instance whether a new state law preempted the Ordinance. *Id.* at 16a.

On June 24, 2002, the district court held that the new state law did not preempt the Ordinance. App. C. On July 29, 2003, the Ninth Circuit affirmed. App. D. Two months later, the Ninth Circuit denied Myers' petition for rehearing. App. E. Myers does not raise any issue of state law preemption in its Petition.

REASONS TO DENY *CERTIORARI*

I. The Court Should Deny *Certiorari* Because The Petition Is Untimely.

Where a federal Court of Appeals has ruled on all issues of federal law, remanding only state law issues that are not reviewable by this Court, a party seeking review

on the federal issues may seek *certiorari* within 90 days of the Court of Appeals' ruling on the reviewable, federal law issues. *See* 28 U.S.C. §§ 1254 (1), 2101 (c), (e). This case presented such circumstances: the Court of Appeals decided all federal questions in the case on June 14, 2001. App. A. The federal questions decided were completely severable from the pendent question of state law that the Court of Appeals simultaneously remanded to the district court: whether a newly enacted California statute pre-empted the Ordinance. *Id.* at 16a. Rather than waiting two years for the resolution of this non-reviewable question of state law, Myers could and should have sought *certiorari* on the federal questions within 90 days of June 14, 2001. In view of Myers' delay in seeking review, especially given Myers' attempt to remedy its failure of proof based on supposed "subsequent events" not before the courts below (*see* Pet. at 4-7, 21-22), this Court should exercise its discretion to deny *certiorari*.

II. The Court Should Deny *Certiorari* Because Myers Lacks Standing To Challenge The Extra-territorial Application Of The Ordinance.

To satisfy Article III's case-and-controversy requirements, Myers must show the following:

> (1) it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Friends of the Earth, Inc. v. Laidlaw Envtl. Services, Inc., 528 U.S. 167, 180-81 (2000). "The party invoking

federal jurisdiction bears the burden of establishing these elements." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

In the present case, Myers' purported injury under both the Due Process and Commerce Clauses was the denial of a contract due to the City's alleged attempt to regulate Myers' conduct in Ohio. That injury, however, was illusory because of a stipulation that Myers signed. Myers stipulated that it was "unwilling to comply with *any* of the City's equal benefits requirements, even if Myers' unwillingness to comply means that Myers would consequently be ineligible for the award of a City contract." App. 91a (emphasis added). Among those requirements were two that make the Ordinance applicable to a contractor's operations (i) within the City and (ii) on real property that the City owns outside of its own boundaries.[1] Sec. 12B.1(d)(i) and (ii); Pet. App. F at 71a. In other words, Myers stipulated that it was unwilling to comply with the Ordinance even within California, where the contract was to be performed. App. 97a.[2] The City had no occasion in this case to consider the discretionary question of whether to apply the Ordinance to Myers' employees providing "administration, supervision and procurement services" in

[1] The City owns no property outside the state of California.

[2] Myers contends that it would have assigned four "Ohio-based" employees to perform the work that the contract called for (App. 97a); however, it is undisputed that while performing the contract work – which was maintenance of City-owned electrical transformers that were part of the Hetch Hetchy Water and Power system – the employees would not be in Ohio but rather would be "on-site" at the City's property located in Moccasin, California. *Id.*

support of the contract from Myers' principal office in Ohio. *See* App. 97a.

As a result of the stipulation, the injury that Myers alleges – the City's purported effort "to control its conduct beyond the boundaries of the State" – was never "actual or imminent." The Court should deny *certiorari* because Myers lacks standing to claim the injury of which it complains.[3]

III. The Court Should Deny *Certiorari* Because The Decision Below Merely Applies Settled Law And Is Consistent With The Decisions Of Other Circuits And Of This Court.

Myers seeks *certiorari* on four grounds. None has merit.

A. As To Myers' Claim Under Due Process, Myers Has Presented No Conflict Among Circuits Or Any Other Sound Basis For Granting *Certiorari*.

Myers mistakenly asserts that in *National Foreign Trade Council v. Natsios*, 181 F.3d 38 (1st Cir. 1999), *aff'd on other grds. sub nom. Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000), the First Circuit applied *BMW of N. Am. v. Gore*, 517 U.S. 559, 572 (1996), in a

[3] Although the lower court rejected on the merits Myers' claims under the Due Process and Commerce Clauses, lack of standing and similar Article III limitations on the federal courts' jurisdiction cannot be waived and are always a basis for denying federal relief. *United States v. Hays*, 515 U.S. 737, 742 (1995).

manner that conflicts with the decision below. Pet. at 9-10. In *BMW*, this Court held that Tennessee violated Due Process by permitting a jury to impose excessive economic sanctions – punitive damages grossly disproportionate to actual damages – on an out-of-state automobile manufacturer for conduct that was lawful in the state where the automobile was manufactured. In the present case, the Court of Appeals ruled that the loss of a contract due to an out-of-state company's decision not to comply with a local government's nondiscrimination-in-contracting provisions did not constitute an "economic penalty" within the meaning of *BMW*. 253 F.3d at 472.

Natsios does not hold otherwise. There, the First Circuit invalidated Massachusetts' Burma Ordinance under the Foreign Commerce Clause. 181 F.3d at 67. In the course of its decision, the court cited *BMW* for the proposition that a state may not deprive a company of a contract based upon extraterritorial conduct that is legal in the place where the conduct occurs. *Id.* at 69.

Significantly, however, *Natsios* is not a Due Process case. The language citing *BMW*, 517 U.S. 559, was not part of, or necessary to, the holding in *Natsios*. *Dicta* creates no conflict between circuits worthy of this Court's resolution.

Further, in this case the Ninth Circuit set forth an alternative ground for rejecting reliance on *BMW*, a ground that distinguishes *Natsios*:

> Even were we to assume that the Ordinance's requirements constitute an economic penalty, narrowly construed the Ordinance only applies in the City, on City-owned property, or as to employees working on a City contract. Thus, the

> Ordinance is 'supported by the [City]'s interest in protecting its own consumers and its own economy.' [*BMW v. Gore,* 517 U.S.] at 572, 116 S.Ct. 1589. While it is possible that the City could attempt to wield extraterritorial control through broadly interpreting section 12B.1(d)(iii), on this facial challenge we will not invalidate the Ordinance unless Myers can 'establish that no set of circumstances exists under which the [Ordinance] would be valid.' *See* [*United States v.*] *Salerno*, 481 U.S. at 745, 107 S.Ct. at 2095.

253 F.3d at 472 (App. 15a).

Myers asserts that the court below erred in applying *Salerno* because Myers' challenge to the Ordinance was not merely "facial" but also "as-applied." Pet. at 9 n. 8 and 16. There are at least three problems with this assertion. First, Myers' challenge under the Due Process Clause was purely facial; only its challenge under the Commerce Clause had both facial and as-applied aspects. Second, even if some misapplication of *Salerno* occurred – which it did not – such an error would not serve as a proper basis for *certiorari*. Finally, Myers waived the contention as to both its Due Process and Commerce Clause claims. In reply to Respondent's argument in the Court of Appeals for applying *Salerno* because of the facial nature of the challenge, Myers failed to assert that it had brought an as-applied challenge. *See* Appellant's Reply Brief at 26, 3-4. Instead, Myers argued only that *Salerno* prescribed the wrong standard to apply in facial challenges. *Id.*

B. As To Myers' Claim That The Ordinance Directly Regulates Interstate Commerce In Violation Of The Commerce Clause, Myers Has Presented No Conflict Among Circuits Or Any Other Sound Basis for Granting *Certiorari*.

Myers erroneously contends that the decision below conflicts with *Natsios* on a second basis: this time, Myers asserts a conflict under the first tier of the two-tier test set forth in *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579 (1986):

> [1] When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry. [2] When, however, a statute has only indirect effects on interstate commerce and regulates evenhandedly, we have examined whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits. (Citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).)

1. The Decision Below Does Not Conflict With *Natsios* Or This Court's Decisions Regarding Whether A Local Contracting Measure Discriminates Against Out-Of-State Commerce.

According to Myers, the decision below holds that the Ordinance does not regulate directly because it is a contracting measure, while *Natsios* holds that the Burma statute's contractual nature does not shield it from invalidation as a direct regulation of commerce. *Id.* Again,

however, the two cases are easily harmonized. In *Natsios*, the challenged statute facially discriminated against foreign commerce by barring from state contracts companies that did business with Burma. By contrast, the Ordinance is neutral on its face. As Judge Wallace stated for the unanimous court below:

> [T]he Ordinance contains no language explicitly or implicitly targeting either out-of-state entities or entities engaged in interstate commerce. Rather the Ordinance applies to all contractors with the City without any reference to the type or extent of a contractor's commercial operations.

Myers I, 253 F.3d at 468 (App. 7a). Thus, the decision below and *Natsios* are not in conflict.

Myers also asserts that the decision below is at odds with *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 97 (1984). Pet. at 11-13. *Wunnicke* has no bearing on this case. There, the Court considered a contracting statute that favored local economic interests by requiring buyers of Alaskan timber to have the lumber processed in-state. The Court rejected Alaska's claim that it could avoid unconstitutionality on the ground that the state was not acting as a regulator but rather as a market participant. In this case, by contrast, the Court of Appeals assumed for purposes of analysis that the City was acting as a regulator, not a market participant. *Myers I*, 253 F.3d at 467. Unlike the statute in *Wunnicke*, the Ordinance withstood scrutiny because it was neutral on its face. *Id.* at 468.

Finally, Myers wrongly contends that "in holding that the ordinance does not directly regulate interstate commerce unless it is facially invalid, the Ninth Circuit's decision is in conflict with" *American Booksellers Found. v.*

Dean, 342 F.3d 96, 104 (2nd Cir. 2003). Pet. at 17. Myers misreads *American Booksellers*. There, the court held that in enacting a statute criminalizing the distribution via the internet of sexually explicit materials "harmful to minors," Vermont had "'projected its legislation' into other States, and *directly regulated* commerce therein," a facial violation of the dormant Commerce Clause. *Id.* (emphasis in original). In this case, by contrast, the court below found no direct regulation of interstate commerce because "employers are 'subject to' the Ordinance only as to employees that have a direct contact with the City." *Myers I*, 253 F.3d at 469, *citing Edgar v. MITE Corp.*, 457 U.S. 624, 643 (1982). *American Booksellers* and the decision below are fully consistent.

2. The Decision Below Conflicts With No Decision Of Other Circuits Or Of This Court Regarding The "Practical Effect" Of A Local Law On Interstate Commerce.

In *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989), the Court considered a Connecticut statute that required out-of-state shippers of beer who sold beer to wholesalers in the state to affirm that their in-state prices were no higher than the lowest prices at which they sold beer in neighboring states. The aim of the law was to protect in-state consumers, and the law did so in a manner that favored wholly in-state sellers over sellers engaged in interstate commerce. *Id.* at 341. In invalidating the statutes, the Court made clear that the critical inquiry in determining whether a statute directly regulates interstate commerce is the statute's "practical effect." Determining "practical effect" includes "considering how the challenged statute

may interact with the legitimate regulatory regimes of other States. . . . " *Id.* at 336.

Applying *Healy* and *Huron Portland Cement Co. v. City of Detroit,* 362 U.S. 440, 448 (1960), the court below upheld the Ordinance. *Myers I*, 253 F.3d at 469-70. Myers produced no evidence that the Ordinance's interaction with any enacted or imminent law from other states created any conflict or imposed any burden on interstate commerce, much less an impermissible burden. *Id.*

Attempting after-the-fact to repair its failure of proof, Myers inappropriately asks the Court to grant *certiorari* based on out-of-state legislation that allegedly (a) arose subsequent to the lower court's decision in this case, and (b) conflicts with the Ordinance. Pet. at 14-15. As to the first legislation cited, however, Nebraska enacted Article I, section 29 of its Constitution in 2000, at least six months before the decision in *Myers I* and two years before the decision in *Myers II.* App. 171a and App. D. The Federal Rules of Appellate Procedure specifically provide a means for parties to advise the court of legal developments while a case is under submission. F.R.A.P. 28 (j). Myers' failure to bring the measure to the attention of the Court of Appeal constitutes a waiver of its right to do so. *See TRW Inc. v. Andrews*, 534 U.S. 19, 34 (2001).

Further, even if Myers had not waived the right to raise this measure as a ground for invalidating the Ordinance, on the merits the Nebraska provision does not conflict with the Ordinance. The Nebraska provision states that civil unions, domestic partnerships, or other similar same-sex relationships shall not be valid or recognized "in Nebraska." The Ordinance does not require the State of Nebraska – or any state or local governmental

agency – to recognize same-sex relationships such as domestic partnerships. Rather, the Ordinance applies only to companies that enter into contracts with the City. A Nebraska-based company doing business with the City may readily comply with the Ordinance without violating the Nebraska provision cited by Myers.

As to the second piece of legislation cited, Myers has not shown that the adoption of Michigan Senate Resolution E is "imminent." *See Huron Portland Cement*, 362 U.S. at 448. The resolution's sponsors introduced the measure and referred it to committee in October 2003. App. 172a. Presumably, adoption would require approval by the legislature, and certainly, it requires approval by the voters of the state. *See* App. 172a. Myers has produced nothing to suggest that either of these contingencies is likely to occur, or when, at the earliest, they might occur.

Further, even if the Resolution's adoption were imminent, it would not warrant the Court's intervention in this case for several reasons.

First, the decision below remains sound as written. It presents no conflict with decisions of this Court or the lower courts.

Second, the proposed amendment, even if adopted, would not have the "practical effect" of conflicting with the Ordinance or changing the nature of the interaction between the Ordinance and Michigan law. Under the proposed constitutional amendment, Michigan would recognize only marriage between a man and a woman, and would recognize no other relationship as the legal equivalent of marriage. App. 172a. That is the current statutory rule of law in Michigan (M.C.L. §§ 551.1, 551.2, 551.271),

and the Ordinance is not to the contrary. As a local nondiscrimination-in-contracting measure, the Ordinance does not – and could not – authorize or create legal equivalence between marital and non-marital relationships. The Ordinance prescribes only that City contractors not discriminate economically in the benefits that they provide to married employees and employees with registered domestic partners.

Put another way, the proposed amendment would not forbid what the Ordinance allows: the proposed amendment would not bar Michigan employers from granting equal benefits, just as current law does not bar such benefits. And the Ordinance, as construed, requires only that Michigan companies doing business with San Francisco make equal benefits available to employees who maintain "minimum contact" with the City or its business. *Myers I*, 253 F.3d at 468-69.

Relying on *Healy* and *Brown-Forman*, Myers asserts that an interstate business's ability to comply simultaneously with inconsistent measures does not necessarily save a law challenged on the ground that its interaction with other states' laws burdens interstate commerce. Pet. at 14-15. But unlike the interaction among various states' statutes in *Healy* or *Brown-Forman*, the projected interaction in this case would not create any significant burden on commerce. The "price affirmation" statutes in *Healy* and *Brown-Forman* had the "practical effect" of forcing beer manufactures to level prices in neighboring states so that they could sell in-state. Such a deterrent to market competition was precisely what "the Commerce Clause was meant to preclude." *Healy*, 491 U.S. at 337. While the Ordinance may impose a slight "burden" on some contractors (both in- and out-of-state), the Ordinance will not

impose an impermissible burden on *commerce*, even in interaction with the Nebraska provision and the Michigan amendment should the latter be adopted. *Myers I*, 253 F.3d at 471, citing *C & A Carbone v. Clarkstown*, 511 U.S. 383, 390 (1994); *see also Fort Gratiot Sanitary Landfill v. Michigan Dept. of Natural Resources*, 504 U.S. 353, 359 (1992) ("As we have long recognized, the 'negative' or 'dormant' aspect of the Commerce Clause prohibits States from 'advancing their own commercial interests by curtailing the movement of articles of commerce, either into or out of the state.'").

C. As To Myers' Claim That The Ordinance Indirectly Regulates Interstate Commerce In Violation Of The Commerce Clause, Myers Has Presented No Conflict Among Circuits Or Any Other Sound Basis for Granting *Certiorari*.

Rather than offering any legitimate ground for *certiorari*, Myers simply argues the merits of its claim that the Ordinance fails the "*Pike* balancing" portion of the two-tier test under *Brown-Forman*. Pet. at 17-20.

First, Myers asserts that "the court [below] failed to articulate any legitimate interest of the City in the [*Pike* balancing] analysis." Pet. at 18. Myers has apparently overlooked the court's statement that "the Ordinance is supported by the [City]'s interest in protecting its own consumers and its own economy." *Myers I*, 253 F.3d at 472. The Ordinance does so by ensuring that companies working for the City provide competitive benefits for unmarried workers, thereby attracting a capable work force.

Myers then acknowledges the City's interest in preventing economic discrimination based on sexual orientation. Pet at 19. Myers proceeds to reargue its case that the Ordinance's service of this interest is "illusory." Pet. at 19-20; *see Myers I*, 253 F.3d at 471-72. This Court's time should not be taken by review of fact-specific contentions rejected by the Court of Appeals.

D. The Court Should Not Remand The Case To The Court Of Appeals For Consideration In Light Of Inconsequential, Subsequent Developments.

Last, Myers asks the Court to grant *certiorari,* vacate the decision below and remand ("GVR") for reconsideration in light of (a) Article I, section 29 of the Nebraska Constitution, (b) Michigan Joint Senate Resolution E, and (c) five years of annual reports of the City's Human Rights Commission on the implementation of the Ordinance ("HRC annual reports"). Pet. at 21. None of these "intervening developments" even remotely justifies a grant of GVR.

As to Nebraska's constitutional amendment, as discussed above, Myers has waived its claim to assert a conflict based upon the provision and, in any event, the provision does not conflict with the Ordinance. *See* p. *ante.*

As to the Michigan provision, its recent proposal is not an "intervening development" that "reveal[s] a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration. . . . " *See Lawrence v. Chater*, 516 U.S. 163, 167 (1996). The premise below was that to overturn the Ordinance under *Healy,* Myers had the burden of producing evidence of conflicting legislation

from other jurisdictions or at least evidence "that the threat of such legislation is both actual and imminent." *Myers I*, 253 F.3d at 269-270, citing *Huron Portland Cement*, 362 U.S. at 448. As discussed above, Myers has not shown that the adoption of the Michigan amendment is imminent. *See* p. *ante*.

Further, even if such adoption were imminent, there is no "reasonable probability" that a re-determination based upon the proposed amendment would affect the result. *See Chater,* 516 U.S. at 167. As discussed above, the amendment, if adopted, would not significantly change anything about the Ordinance's practical effect on interstate commerce. *See* p. *ante*.

Finally, as to the HRC annual reports, the first three were published on the City's website by August 2000, three months before the parties argued the case in the Court of Appeals and nearly a year before the court decided it. Pet. at 5-7. Such public documents are not "subsequent" developments, and Myers' failure to raise them below means it has waived any right to rely on them.

As to the fourth and fifth annual reports, Myers quotes post-ruling

(1) statistics on the number of City contractors nationwide that offer equal benefits;

(2) statistics on the number of workers nationwide who have benefited;

(3) statements expressing pride in the number of workers who have benefited from the Ordinance;

(4) statements expressing the City's policy of trying to persuade contractors to extend

equal benefits beyond what the City can require; and

(5) statistics on the number of City contractors that have voluntarily extended benefits beyond what the Ordinance requires.

Pet. at 6, 10, 19. These are the same kinds of statistics and statements included in the three pre-ruling HRC annual reports. There is nothing outcome-determinative – or reasonably likely to be outcome-determinative – about any of them. Myers has presented no basis for the Court to take the extraordinary step of reopening a case properly decided more than two years before Myers sought *certiorari*.

CONCLUSION

The Court should deny the writ.

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Respectfully submitted,

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